**Chep USA *and* Anthony McGlothian.** Case 26–CA–20126

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 5, 2001,[1] Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] to the extent consistent with this decision and to adopt the recommended Order.[4]

We agree with the judge that the Respondent did not violate Section 8(a)(1) of the Act by discharging employee Anthony McGlothian. For the reasons stated below, we agree with the judge that McGlothian's ringing of the bell was not protected by the Act.

The Respondent's policy regarding the bell is that the plant supervisor rings a break bell to signal the beginning and end of each break and lunch. If the bell is rung at times other than scheduled breaks or lunch, employees know they are to leave their workstations and report to the breakroom for a meeting with management. Only a manager or a management designee may ring the bell.

On January 10, without management authorization, employee McGlothian rang the bell during worktime, causing all 50–52 employees on the second shift to cease production and report to the breakroom. McGlothian rang the bell to discuss with employees his concerns about the Respondent's being open on the Martin Luther King Day holiday. McGlothian breached management's policy regarding the break bell by ringing the bell without authorization. The employees were not aware of the fact that he was the bell-ringer.

Since late December 2000, McGlothian had held meetings with employees during breaks to discuss his concerns about the Martin Luther King holiday. McGlothian's prior meetings had been held during scheduled breaks and lunch and, as noted by the judge, constituted protected activity.

In contrast, his ringing of the bell on January 10 was not protected. By ringing the bell at this unscheduled time, McGlothian caused employees to leave their workstations, stop production, and report to the breakroom. There is no evidence that employees knew that McGlothian was going to ring the break bell on January 10 or that he was the bell ringer. Essentially, McGlothian caused the employees to unwittingly engage in a work stoppage.

Having found that McGlothian did not engage in protected activity when he rang the break bell, we find that the Respondent did not violate Section 8(a)(1) of the Act by discharging McGlothian for ringing the bell.

Notwithstanding whether McGlothian's conduct was protected,[5] the General Counsel argues, in the alternative, that McGlothian's discharge was unlawful because the Respondent relied, in part, on an unlawful solicitation rule to support the discharge. We reject that alternative argument.

The judge found that the solicitation rule from the 2000 handbook was unlawful, but that the solicitation rule from the 2001 handbook was lawful.[6] We noted in footnote 3 that no exceptions were made to these findings. Although the judge did not clearly identify which solicitation rule the Respondent relied on in discharging

[1] All dates are in 2001, unless noted otherwise.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility findings, we do not adopt her finding that an adverse inference must be drawn from the General Counsel's failure to call a former employee of the Respondent to testify. See, e.g., *Hitchiner Mfg. Co.,* 243 NLRB 927 (1979), enfd. 634 F.2d 1110 (8th Cir. 1980).

[3] No exceptions were filed to the judge's findings that: (1) the Respondent maintained an unlawful solicitation and distribution rule from August to December 31, 2000; and (2) the new rule, implemented on January 1 was not violative of the Act.

[4] We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[5] We do not pass upon the judge's rationale that McGlothian's action was unprotected because he caused a partial strike. A work stoppage of short duration may not constitute a partial strike, and it may be protected. Nor do we pass upon the judge's rationale that McGlothian's action was unprotected because he sought to unilaterally determine working conditions. At most, McGlothian's conduct was designed to pressure *the Respondent* to set a working condition, i.e., a Martin Luther King holiday.

[6] The solicitation rule contained in the 2001 handbook provides, among other things, that the following conduct may lead to disciplinary action, up to and including immediate termination of employment: "Unauthorized solicitation of team members during working time." The solicitation rule contained in the 2000 handbook states, among other things, that the following conduct may lead to termination: "Unauthorized soliciting or distributing of literature to employees while on duty or on company premises[.]"

McGlothian, we find that the record establishes that the Respondent relied on the lawful solicitation rule contained in its 2001 handbook.

The 2001 handbook became effective by its terms on January 1, 2001, and, as found by the judge, was implemented on that date. Copies of the 2001 handbook were available to onsite managers prior to McGlothian's discharge. Plant Manager Tim Rued and Second-Shift Supervisor Myrt Price had copies of the 2001 handbook before January 10, as did onsite Human Resources Administrator Joyce Lee.

Management witnesses testified that they relied on the 2001 handbook in discharging McGlothian. Lee and Director of Field Human Resources Donna Kuchwara testified that McGlothian was terminated under the company rules contained in the 2001 handbook. Kuchwara noted that all of the new terms and conditions took effect January 1, including the new increase in the number of personal days off for employees. Rued testified that employees had not been disciplined under the 2000 work rule for violating the solicitation rule and that management had agreed to follow the 2001 handbook "from January 1st onward." Rued further testified that he told McGlothian that he had violated the solicitation policy of soliciting team members during working hours. McGlothian confirmed Rued's testimony. Specifically, McGlothian testified: "Mr. Rued told me on the 11th of January, 2001, he told me that the reason why I was terminated was because of unauthorized solicitation of team members during the working time."

The managers' testimony is consistent with the January 15 termination letter, which quotes verbatim from the 2001 handbook. The letter states, as its first reason for terminating McGlothian, "Unauthorized solicitation of team members during working time."

In these circumstances, we conclude that the record demonstrates that the Respondent discharged McGlothian pursuant to the lawful solicitation rule contained in its 2001 handbook.

The evidence relied on by the General Counsel does not warrant a contrary result. The fact that management did not begin distributing the 2001 handbook to employees until January 23 is not determinative, nor is the alleged "admission against interest" by the Respondent's counsel in an April 12 letter. With respect to the latter point, we recognize that counsel's letter, written to the Regional Office of the Board, said that the new rule was "presented" at the Sardis plant on January 25. However, in determining which solicitation rule was applied, it is appropriate to examine the entire record, not merely the representations of its counsel here. See *Optica Lee Borinquen, Inc.*, 307 NLRB 705 fn. 6 (1992), enfd. mem. sub. nom. *NLRB v. Optica Lee Borinquen, Inc*., 991 F.2d 786 (1st Cir. 1993).

Accordingly, we reject the General Counsel's argument that the Respondent violated Section 8(a)(1) of the Act by discharging McGlothian pursuant to the unlawful 2000 solicitation rule. Rather, we find that the Respondent did not violate Section 8(a)(1) when it discharged McGlothian pursuant to the lawful 2001 solicitation rule.

Our concurring colleague says that the Respondent "maintained an overbroad no-solicitation rule as of the beginning of January 2001." However, the judge found, and we agree, that that rule came to an end on December 31, 2000, and a new lawful rule was implemented on January 1, 2001. McGlothian was discharged on January 11. Thus, the Respondent could lawfully rely on the extant lawful rule.

Our colleague also says that, in the absence of a valid rule, an employer must show that the disciplined employee actually interfered with work. Of course, as noted above, the Respondent here had a valid rule. Further, even if the Respondent had no such rule, we agree with our colleague that an actual interference occurred.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Chep USA, Sardis, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

Contrary to the majority view, the Respondent did rely on an invalid no-solicitation rule in discharging employee Anthony McGlothian. But the Respondent nevertheless proved that it "acted in response to an actual interference with or disruption of work." *Trico Industries*, 283 NLRB 848, 852 (1987). On that ground, I concur in the conclusion that McGlothian's discharge was lawful.

I.

The majority acknowledges that Respondent maintained an overbroad no-solicitation rule as of the begin-

ning of January 2001,[1] which violated Section 8(a)(1).[2] The evidence is undisputed that, as of the date of McGlothian's discharge (January 11), the Respondent had neither retracted the unlawful rule, nor had it promulgated or disseminated to employees revisions to the rule that would have made it lawful. The original rule remained unchanged until a new handbook was distributed to employees no earlier than January 23 *after* McGlothian had been terminated.

In the interim, on January 15, 2001, the Respondent issued a letter explaining the reasons for McGlothian's discharge, citing four specific work rules that he was alleged to have violated on January 10. One of these rules was "Unauthorized solicitation of team members during working time."

Under established precedent, the Respondent's express reliance on its overbroad no-solicitation rule in McGlothian's discharge letter makes out the prima facie showing that his discharge was unlawful. The Board has recently reaffirmed the established principle that "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." *Double Eagle Hotel & Casino*, 341 NLRB No. 17 fn. 3 (2004) (citing cases).[3]

There is no sound factual or legal basis for the majority's surmise that the Respondent actually relied on, or could properly rely on, a rule not yet promulgated to employees in order to discharge McGlothian.[4] As the Board has explained, in the absence of a valid no-solicitation rule, a discharge based on solicitation during worktime "is suggestive that the employer was reacting to the protected aspect of the employer's conduct, rather than considerations of plant efficiency." *Greentree Electronics Corp.*, 176 NLRB 919, 919 (1969), enfd. 432 F.2d 1011 (9th Cir. 1970). A rule unknown to employees can hardly dispel this suggestion, which reasonably tends to chill protected, concerted activity, in violation of Section 8(a)(1).

II.

Nevertheless, even in the absence of a valid no-solicitation rule, Board law allows an employer to discipline employees for worktime solicitations, if certain conditions are met. This limited provision was articulated in *Trico Industries*, supra:

> [W]hen an employer has failed to adopt and publish a valid rule regulating union activity during working time, discipline for that reason will be upheld as lawful only when the employer demonstrates that it *acted in response* to an *actual* interference with, or disruption of work.

283 NLRB at 852 (emphasis in original). See *Cal Spas*, 322 NLRB 41, 56 (1996), enfd. in relevant part 150 F.3d 1095 (9th Cir. 1996); *Mast Advertising & Publishing, Inc.*, 304 NLRB 819, 827 (1991).

Here, by ringing a bell reserved for management's use to signal breaks and meetings, McGlothian caused the entire work force on the Respondent's second shift to cease working and to assemble in the plant cafeteria, where the Respondent saw him addressing employees about the Respondent's intent to have employees work on the upcoming Martin Luther King holiday.[5] The next day, he was informed that he was being discharged because he had caused production to be stopped in the Sardis, Mississippi plant.

Thus, the Respondent first explained the basis of McGlothian's discharge as his stopping production on the day that he was terminated. On these facts, the Respondent has demonstrated that it legitimately terminated McGlothian for interference with production.

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[1] All dates are in 2001, unless otherwise indicated.

[2] There are no exceptions to the judge's finding that the rule was unlawful, as it barred all unauthorized solicitations on the Respondent's premises, even when employees were not working.

[3] This principle has been endorsed by the courts. See *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 931 fn. 9 (5th Cir. 1993); *Asociacion Hospital del Maestro, Inc. v. NLRB*, 842 F.2d 575, 578 (1st Cir. 1988).

[4] An employer's attempt to amend an unlawful rule is not an adequate basis to show that the unlawful rule is repudiated. See *NLRB v. St. Vincent's Hospital*, 729 F.2d 730 (11th Cir. 1984).

[5] Under the circumstances, McGlothian's bell-ringing communicated no invitation to stop work to discuss the Martin Luther King Day issue. This case would be different, of course, if the bell-ringing had been a prearranged signal among employees to stop work or if McGlothian had communicated his intention in some other, explicit way.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule that requires you to obtain our authorization to engage in protected activity in nonwork areas on your own time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE HAVE rescinded the rule that required you to obtain our authorization to engage in protected activity in nonwork areas on your own time.

CHEP USA

*Melvin Ford Esq.* and *Pedro Arguello, Esq.*, for the General Counsel.

*Vasilis Katsafanas Esq.* and *Caroline Montan Landt, Esq.*, for Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. Anthony McGlothian (McGlothian) filed the charge, on February 22, 2001[1] and the complaint issued on May 31, 2001. The complaint alleges that Chep USA (Respondent) violated Section 8(a)(1) of the Act by discharging McGlothian on January 11, 2001, because McGlothian engaged in concerted activity with other employees for the purposes of mutual aid and protection. An amendment to complaint clarifying the jurisdictional paragraph issued on July 26, 2001. At trial, the complaint was further amended to include the allegation that Respondent terminated McGlothian because he violated an invalid solicitation and distribution rule and to discourage employees from engaging in these and other concerted activities. In its answer, Respondent has denied all of the pertinent allegations of the complaint and its amendments. A trial on these matters was conducted before me in Memphis, Tennessee, on August 29 and 30, 2001.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation, with a facility in Sardis, Mississippi, where it is engaged in the receipt, repair and re-shipment of pallets. Based upon a 12-month projection of its operations since about August 1, 2000, at which time the Respondent commenced operations, the Respondent, in conducting its business operations will receive, recycle, service and repair pallets valued in excess of $50,000 directly from points located outside the State of Mississippi. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

*A. Background*

Plant Manager Tim Rued assumed responsibility for the operation of Respondent's facility upon its startup in August 2000. Rued's daily hours at the plant normally run from as early as 7:30 a.m. to 6 p.m. in the evening. The individual shift managers are responsible for the operation of the plant in Rued's absence. The shift managers have the authority to discipline up to, and including, suspension. Beyond suspension, the manager is required to consult with Rued and human resources.

*B. Respondent's Holiday Policy*

As of January 1, 2001, Respondent recognized 12 holidays for its employees. A written notice posted at the facility informed employees "While these days are observed as holidays, we most likely will be open on these days, with the exception of Thanksgiving and Christmas." Respondent submits the nature of its business requires its operation be ongoing. Martin Luther King Day was included among the 12 holidays. If an employee is scheduled to work on one of the designated holidays, the employee is paid time and a half plus holiday pay. An employee normally making $8 an hour would receive $20 an hour if required to work on a scheduled holiday. If an employee does not want to work on a scheduled holiday, he or she may submit a request to take a personal leave day or "PDO." Employees are given an allotted number of PDO's to take throughout the year. If an employee chooses to take a PDO on a scheduled holiday, the employee receives holiday pay but does not receive the additional time and a half that he or she would receive if actually working the holiday. Additionally, the PDO is not credited against the employee for the holiday absence. Respondent asserts the requirement to submit a request for a PDO is for tracking purposes only. There are however, a limited number of PDO's that can be taken on a given holiday. The total number of authorized PDO's on a holiday is determined by management and depends upon the time frame and the volume of work at that particular time. Even though most of the company holidays are mandatory workdays, management may also determine that the full plant complement is not needed for a particular holiday. In such case, the employees may be offered the opportunity to volunteer to work on a scheduled holiday. The employees who volunteer to work on the scheduled holiday receive time and a half pay plus their additional holiday pay.

*C. Respondent's Version of the Events of January 10, 2001*

As shift manager, Myrt Price was the only supervisor at the plant during second shift on January 10. Second shift begins at

[1] All dates are in 2001 unless otherwise indicated.

3:30 p.m. and ends at 12 a.m. The first break of the shift is scheduled from 5:30 to 5:45 p.m., the dinner break runs from 7:30 to 8 p.m., and the final break is scheduled for 10 to 10: 15 p.m. In Rued's absence, Price was in charge of the plant and responsible for the 50 to 52 employees working on that shift. As supervisor, Price rings a bell to signal the beginning and the end of each break.[2] If the bell is rung at any time other than scheduled breaks, the employees know they are to report to the breakroom for a meeting with management.

Both McGlothian and Price testified they were friends. Price provided McGlothian a ride home every night. Price's testimony was uncontroverted that he had previously given McGlothian $200 to pay on his utilities. On another occasion, Price gave McGlothian $100 to pay on his car note when he did not have enough money to make his payment. As a friend, Price was aware that McGlothian wanted to be off on Martin Luther King Day on January 15. Approximately 2 weeks before his termination, McGlothian asked Price if he could take off on Martin Luther King's birthday. At the time of McGlothian's request, the holiday was scheduled as a mandatory workday. Price told McGlothian that by using a PDO, he could take off that day. McGlothian continued to have several conversations with Price about the holiday. During these conversations, McGlothian repeatedly told Price that he didn't think that employees should have to use a PDO for this particular holiday. Price was aware that McGlothian shared this opinion with other employees as well.

Respondent does not dispute this subject had been a topic of conversation for McGlothian with other employees for several weeks prior to his discharge. Price recalled McGlothian brought up this same issue during shift meetings and met with other employees during lunch and breaks to discuss this same issue. During some of these discussions, Price was present in the breakroom and overheard the discussions.

On January 10, employees had their usual dinner break from 7:30 to 8 p.m. At approximately 8:45 p.m., Price was in his office counseling with one of his employees concerning a disciplinary issue. Despite the fact that the employees had just returned from their lunchbreak at 8 p.m., he heard the break bell sound. Because he was in the middle of the counseling session, he could not leave his office immediately. Price estimated that it took him about 5 to 10 minutes to get to the breakroom. Before getting to the breakroom, employee George Coley found him and asked if he had called a meeting. Price told him that he had not.[3]

When Price entered the breakroom, he saw all of the second shift employees assembled with McGlothian addressing the employees. Price overheard McGlothian again discussing why employees should be off for Martin Luther King's birthday. Price told Paul Henderson to sound the break bell for everyone to go back to work. When Price told the employees they should return to work, they immediately did so. After telling the employees to return to work, Price called McGlothian into his office. No one else was present in the office other than McGlothian and Price. When Price asked McGlothian if he had rung the bell to signal the meeting, McGlothian told him that he accepted full responsibility. Price told McGlothian that what he had done was unacceptable. Price told McGlothian that he was suspended for the remainder of the evening and directed him to leave the plant. When McGlothian reminded him that he didn't have a ride home, Price arranged transportation.

Plant Manager Rued recalled Price calling him at home on January 10 and reporting that Anthony McGlothian sounded the break bell and stopped production in the plant. The next day Rued consulted by telephone with Mike McGuffy, Director of Field Operations and Donna Kuzhwara, Director of Human Resources. He also met with Price and Human Resources Administrator Joyce Lee. Later in the morning, he also participated in a conference call with Price and Kuzhwara. As a result of these management meetings, it was determined that McGlothian would be terminated for having sounded the break bell and stopping production.

When McGlothian came in to work on January 11, he was called into a meeting with Price, Rued, and Lee. At that time, McGlothian was told he was terminated for having rung the break bell and for stopping production. Rued, Price and Lee all testified that at no time during this meeting McGlothian ever denied ringing the bell. Lee recalled McGlothian's response was to turn to Price and tell him "You ain't shit man." Then McGlothian asked Price if he were going to take him home. When Price told him no, Rued offered to take McGlothian home. During the 5- to 6-minute ride to McGlothian's home, Rued told him that he should have talked with him first before doing what he did. Rued explained that it might have made a difference if McGlothian had spoken with him. He suggested that perhaps the company could have made the holiday a volunteer workday and let part of the employee's work that day. Rued also asked McGlothian "What possessed[4] you to ring the bell and stop production?" McGlothian only replied that he was not going to talk with Rued anymore because he had fired him. Rued recalled they had ridden in silence for the remainder of the trip. Rued testified that at no time during this ride did McGlothian ever tell him that he had not rung the bell or that anyone else had rung the bell.

*D. Respondent's Reason for Terminating McGlothian*

Respondent asserts McGlothian was terminated on January 11 because he rang the break bell without authorization to do so and stopped the production of the plant. In a letter dated January 15, Joyce Lee set out the individual company work rules that were violated by McGlothian on January 10. The following rules are identified as follows:

> 1. Unauthorized solicitation of team members during working time.

[2] Rued testified the only time that the bell should sound is for scheduled breaks or management meetings. Only managers or a management designee may sound the bell. Price had also designated employee Paul Henderson to ring the bell for scheduled breaks.

[3] Coley testified that on that particular evening, Price had already called two meetings. When Coley heard the bell at 8:45 p.m., he proceeded to the breakroom as he had for the earlier meetings. When he arrived at the breakroom, he had not seen any supervisor.

[4] On cross-examination, General Counsel pointed out that Rued had stated in an earlier Board affidavit that he had used the word "compelled" rather than "possessed."

2. Leaving the workstation, during working hours without permission.

3. Abandonment of company-owned equipment or leaving equipment unattended.

4. Failing to follow work rules.

Rued testified that had McGlothian told him during the meeting on January 11 or on his ride home that he had not rung the bell, he would have initiated an investigation into the matter. Rued also explained that there is a security monitoring system in the plant that films the interior of the plant. Had McGlothian reported in his meeting with Price on January l0 or in his meeting with other management on January ll that he had not rung the bell, the security film could have been used to determine who had rung the bell. As the camera uses continuous film, the film is replaced every 72 hours. Rued explained that even if the film had not been available, he would have initiated an investigation by interviewing employees who might have seen who rang the bell. Rued testified that even if McGlothian had told him that he had not rung the bell after his termination, it would have made a difference and he confirmed that McGlothian might have been reinstated.

Donna Kuzhwara testified that if she had been told that McGlothian had not rung the bell, she would have spoken with McGlothian to find out who was responsible. Depending upon all the facts, he might not have been fired. She also testified that even after his termination, she would have investigated the matter and appropriate action would have been taken if she had been told that McGlothian did not ring the bell. She maintained however, that neither before nor after the termination was she ever told that McGlothian did not ring the break bell.

*E. McGlothian's Version of the Events of January 10*

Anthony McGlothian began working at Respondent's new facility on September 5, 2000. McGlothian worked as a lead board operator under the supervision of Mryt Price on Respondent's second shift operation. McGlothian testified he first began talking with other employees about being off on Martin Luther King's birthday as early as December 2000. He recalled he had these discussions with other employees on numerous occasions. McGlothian spoke with other employees about this topic almost nightly during the scheduled breaks in the breakroom. He estimated the number of employees present for these discussions ranged from 8 or 9 employees to as many as 20 to 30 employees. He also discussed this same topic with Price both at work and during their ride home at the end of the shift. Although he told Price that he thought that employees should be off for this holiday, Price explained that employees would have to use a PDO to take off because it was a mandatory workday. McGlothian does not dispute that Price authorized him to take a PDO and to take the day off.

McGlothian testified that on January 10, he had discussions about the holiday with about 20 to 30 employees during their lunch break from 7:30 to 8 p.m. Only about five or six employees did most of the talking. Price had not been present in the breakroom during this particular lunchtime discussion. Consistent with other conversations, McGlothian told the employees that he thought that they should be off work on Martin Luther King's birthday. McGlothian asserts that employees Bobby Gross and Paul Henderson told the employees that Price had made the statement to Dedderick Ford that "ain't nobody going to take off that day but a bunch of niggers. That is nigger day, you know." The record reflects that both Myrt Price and Anthony McGlothian are African American. McGlothian testified that hearing this comment upset him and other employees in the breakroom. The break ended at 8 p.m. and the employees returned to their work area as usual. McGlothian testified that while he was working, employee Darrell Sledge came up to him and began talking about the alleged "nigger day" statement. McGlothian told Sledge he was going to have a meeting with employees to discuss this further at the 10 p.m. scheduled break. McGlothian contends that Sledge told him "No, I am going to push the buzzer right now." McGlothian testified that Sledge then proceeded to ring the bell about three or four times. Consistent with the procedure for called meetings, all of the employees left their workstations and started toward the breakroom. McGlothian asserted that since the employees were going to the breakroom anyway, he decided that he would just go ahead and have the meeting with them at that time. McGlothian contends that it had been Sledge who had spoken first when the employees assembled in the breakroom and then he had added his comments. The meeting lasted only about 6 to 8 minutes before Price walked into the breakroom. McGlothian also asserted that employee John Smith was talking with the assembled employees when Price walked into the breakroom. Price ordered the employees to return to work and they did so.

McGlothian recalled his conversation with Price in the office following the meeting. Price asked him, "Why did you do me like that?" McGlothian explained they had been having a meeting about the holiday. Price reminded McGlothian that he had already been given the day off and was authorized to use a PDO. McGlothian again asserted that he didn't think that employees should have to use the PDO. Price asked him who rang the buzzer to call the meeting. McGlothian maintains he told Price that he had not rung the bell. McGlothian said that he went on to tell Price that while he would not tell him who had rung the bell, he would take full responsibility for it.[5] Price made the further statement "You shouldn't have done me like that. What if the employees on my shift didn't show up and the employees on the white man's shift went home."[6] Price then informed McGlothian that he was going to recommend a three-day suspension as discipline. McGlothian was sent home for the evening and told to return at his regular shift time the next day.

When McGlothian reported to work on January 11, he was directed to meet with Joyce Lee, Myrt Price and Tim Rued. McGlothian testified that when he was told that he was terminated, he had responded by saying to Price "You are a dirty low down mother-fucker." McGlothian then proceeded to ask Price to give him a ride home. When Price declined, Rued took him home. On the drive home, Rued asked McGlothian "What possessed you to do it." Rued also told McGlothian that he

[5] McGlothian recalls he told Price "I'm already fired so there's no use in two people being fired."

[6] There were only two shifts in operation in January 2001.

would have given McGlothian time off if only he had come to him. Rued explained that he had already had a meeting with first shift employees and had given them the opportunity to take off if they wanted to do so. McGlothian admitted that during his meeting with Lee, Price, and Rued, he did not tell them that he had not rung the bell. He further admitted that during the ride home with Rued, he did not tell Rued that he had not rung the bell.

*F. McGlothian's Additional Contacts with Management*

On January 15, McGlothian returned to Respondent's facility, accompanied by NAACP Representative Julius Harris. McGlothian requested a copy of his termination letter and requested a meeting with Rued.[7] McGlothian testified that in talking with Rued, he planned to ask for reinstatement. Rued was not available for a meeting at that time and Lee gave McGlothian the termination letter. (GC Exh. 3). Lee set up an appointment for McGlothian to meet with Rued the following Wednesday. The scheduled meeting was postponed however, due to Rued's unexpected absence for surgery,[8] McGlothian testified he returned to the plant approximately 2 weeks later and presented an appeal letter. In the letter (GC Exh. 6), McGlothian requested reinstatement with backpay. McGlothian stated that he had been fired without a warning and without a second chance. He concludes the letter by stating that he believes he deserves a chance. The letter contains no denial that he was the one who rang the bell on January 10.

*G. Respondent's Solicitation/Distribution Rule*

When Respondent began its operation in August 2000, the employee handbook contained company work rules for employees. Section 18 contains a listing entitled "Conduct That Can Lead to Immediate Termination." Included among this conduct is the following:

> Unauthorized solicitation, collection, or distribution of literature, posting or removing of notices/signs, or writing, in any form, on CHEP USA's premises.
>
> Unauthorized soliciting or distributing of literature to employees while on duty or on company premises or posting unauthorized printed matter or altering posted company information.

As director of field human relations, Donna Kuchwara is responsible for human relations for all field company owned premium service centers, all company managed premium service centers, and all corporate employee relations. Respondent's facility in Sardis, Mississippi, is one of the Company's premium service centers. Shortly after she began working for Respondent in August 2000, Kuchwara began a review and revision of the employee handbook. After submitting it to the managers in the field for input and to corporate counsel, the new handbook was finalized and distributed to the managers in the field in December 2000. The provisions of the new handbook became effective January 1, 2001. The parties stipulated the new handbook was distributed to the employees at the Sardis facility on January 23, 24, and 25, 2001.

The new handbook's section on company work rules contains the following:

> All successful businesses have certain rules team members must follow to ensure continued customer and team member satisfaction. If team members neglect their duties or violate established standards, they are subjecting themselves to disciplinary action—the severity of which will depend upon the circumstances. Disciplinary action will be taken if facts show that it is justified. If you disagree with any action taken, the Team Member Clarification Process is available for your use.

The following includes, but is not limited to, examples of team member work rules which are not permitted and which, if violated, will subject the team member to disciplinary action, up to and including immediate termination of employment:

> Respondent includes in this list the following rules for solicitation and distribution:
>
> Unauthorized distribution of literature to team members during working time or in working areas.
>
> Unauthorized solicitation of team members during working time.

Human Relations Administrator Lee testified that McGlothian was terminated under the guidelines of the 2001 handbook. She also confirmed that no employees were ever disciplined under the prior solicitation policy.

*H. Analysis and Conclusions*

1. McGlothian's termination

General Counsel submits this case is the classic protected concerted activity situation as McGlothian was terminated because he and other employees met to discuss common concerns. General Counsel cites the Supreme Court's 1962 holding in *Washington Aluminum Co.*[9] as precedent for just such unlawful conduct. In *Washington Aluminum*, the Court found the Employer unlawfully terminated seven unorganized employees who concertedly walked off their job in protest of the cold working conditions. The Board has subsequently established the test for determining whether an employee has been discharged for protected concerted activity under Section 8(a)(1) of the Act. See *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers Industries. (Meyers II)*, 281 NLRB 882 (1986*);* and *Diva Ltd.*, 325 NLRB 822, 830 (1998). In order to be found "concerted," an employee's activity must be engaged in, with, or on the authority of other employees, and

[7] During his conversation with Lee on January 15, McGlothian went over the termination letter with Lee, inquiring about how the work rules applied to him. McGlothian recalled that Lee told him "When you rang the bell, employees could have thought that there was a fire. McGlothian did not tell Lee that he had not rung the bell.

[8] Lee testified that following the cancellation because of Rued's surgery, she set up an additional meeting for McGlothian and Harris with Rued. Harris had not shown for the meeting. After a month had passed, Lee called Harris to find out when he wanted to have the meeting and he had told her that he was not coming. McGlothian did not rebut her testimony.

[9] 370 U.S. 9 (1962).

not solely on behalf of the employee himself. In the second *Meyers* decision, the Board clarified the activity could still be found to be concerted under the new test if there is some demonstrable linkage to group action. Once the activity is found to be concerted, an 8(a)(1) violation will be found, if in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity.

In its decision in *Washington Aluminum*, the Court clarified that employees do not lose their right to engage in activity under Section 7 merely because they do not present a specific demand on the employer to remedy a condition that they find objectionable before they take action. The Court also stated that Section 7 does not protect all concerted activities. General Counsel asserts the concerted activity in the instant matter does not fall into any of these unprotected categories[10] and thus should be found as protected concerted activity.[11]

In *Specialty Sands, Inc.*, 333 NLRB 796 (2001), the Board found an employer unlawfully failed to recall employees from layoff because of their letter protesting the employer's designation of paid holidays. The Board has also found that employees walking off their job for 2 hours with only 15 minutes notice to protest staffing levels is protected concerted activity. See *Bethany Medical Center*, 328 NLRB 1094 (1999). In his brief, Counsel for the General Counsel cites cases in support of the premise that McGlothian was discharged for having engaged in protected concerted activity. In *Johnnie Johnson Tire Co.*, 271 NLRB 293 (1984), the Board found that General Counsel met the burden of establishing a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision for termination. General Counsel also relies on *Liberty Natural Products, Inc.*,[12] a case in which employees signed and posted a petition on the employer's door, expressing their discontent for the employer's policy on paycheck distribution. The decision notes that employees who are unrepresented and working without an established grievance procedure have a right to engage in spontaneous concerted protests concerning their working conditions. In reaching this decision, it was also determined that the employees were not unduly disruptive of the employer's operation. In the third case cited by General Counsel, the Board found the reason for an employee's discharge to be his activity in concert with another employee regarding their mutual safety concerns about an unsafe truck.[13]

In the instant case, Respondent argues the circumstances were contrary to *Washington Aluminum* as the employees were tricked into assembling in the breakroom and did not go there for the purpose of engaging in concerted activity. While undisputed, such a circumstance would not prevent a finding of protected concerted activity. The Board has previously recognized that employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted. See *Gran Combo*, 284 NLRB 1115 (1987); *Whittaker Corp.*, 289 NLRB 933 (1988).

Based on Board and Court precedent, it is clear that McGlothian engaged in concerted activity on January 10. He met with other employees to discuss a common concern and a matter affecting their terms and conditions of employment. Respondent was certainly aware of the concerted activity. With respect to the third factor set forth in *Meyers*, the assembling of the employees was not such an egregious act or of such a serious nature to be categorized as unlawful, violent, or a breach of contract. See *YMCA of the Pike's Peak Region*, 291 NLRB 998 (1988). The fourth factor enunciated by the Board in *Meyers* however, precludes my finding that McGlothian was terminated for engaging in protected concerted activities under Section 8(a)(1) of the Act. I find the cases cited by General Counsel are distinguishable from the case in issue. Unlike the circumstances in *Liberty Natural Products, Inc.*, supra, McGlothian's unauthorized ringing of the bell was not a spontaneous concerted protest. He had been actively and openly involved in protected concerted activity for at least a 2-week period prior to his termination. Unlike the circumstances of the cases cited by General Counsel, I do not find McGlothian's concerted activity to be a "motivating factor" in the decision to terminate him.

The record is undisputed that McGlothian had been voicing his concerns about the Martin Luther King holiday to both employees and management for a number of weeks prior to his discharge. His testimony reflects he consistently met with other employees to discuss these concerns during his regularly scheduled break time as well as to raise these concerns in shift meetings. It is undisputed that management initiated no restrictions on this protected concerted activity.

Tim Rued, Donna Kuzhwara, Joyce Lee, and Myrt Price all credibly testified that McGlothian was terminated because of his having sounded the break bell and stopping production. It is reasonable that this is the true reason for his discharge as this event is the only occurrence that set this evening apart from the other evenings. His meeting with employees to talk about the holiday was no different on January 10 than in prior weeks. At trial, McGlothian contends that he was not the employee who was responsible for ringing the bell and stopping production. I do not credit McGlothian's denial.

While McGlothian asserts that he was not responsible for ringing the break bell on January 10, he acknowledges that he denied this to only one person in management. McGlothian admits he never voiced this denial in his meeting with Rued, Price, and Lee on January 11. While he had the opportunity to tell Rued what happened during his ride home on January 11, he never raised this denial with Rued. He also admitted that while he spoke with Lee on January 15, he did not deny that he had rung the bell. Although he wrote a letter of appeal on January 29, he did not include a denial of ringing the bell. Rather than denying what he had been accused of doing, McGlothian asserted that he deserved a second chance. Tim Rued credibly testified that McGlothian's denial in his trial testimony was the first time he had ever heard that McGlothian did not ring the bell. I credit Rued's testimony as McGlothian

[10] Examples of unprotected activity were identified as unlawful, violent, in breach of contract, and what the Court characterized as "indefensible."

[11] General Counsel argues that there was no cost, harm, or damage to the employer and that no employees were harmed.

[12] 314 NLRB 630, 638 (1994).

[13] *Portland Airport Limousine Co.*, 325 NLRB 305, 306 (1998).

himself admits that he had at least four opportunities to raise this denial, but did not.

The record is also devoid of any witness who can corroborate McGlothian's testimony that he did not ring the bell. The absence of corroboration is especially prominent in General Counsel's failure to call Darrell Sledge. McGlothian admitted that Sledge had since been fired from Respondent's facility and McGlothian had spoken with Sledge as recently as a couple of months before the trial. Based on Sledge's current employment status, it is difficult to believe his failure to appear as a witness was based on intimidation by or loyalty to, Respondent. The more logical conclusion is that Sledge was not called to corroborate McGlothian because he could not do so. I must conclude General Counsel's failure to call Sledge was because his testimony would have been adverse to General Counsel's position.[14] See *Electrical Workers IBEW Local 3 (Teknion, Inc.)*, 329 NLRB 337 (1999); and *Forsyth Electrical Co.*, 332 NLRB 801 (2000).

An additional factor that belies McGlothian's credibility is his insistence that he told Myrt Price on January 10 he did not ring the bell. In his description of his conversation with Price, McGlothian asserts he told Price that since he was already fired, he was not going to divulge the name of the person who rang the bell. He allegedly added that he didn't want to cause the termination of a second employee. His logic is reasonable, if not admirable, had the circumstances supported such an action. McGlothian's own testimony however, contradicts such logic. In his testimony, he asserts that after he refused to disclose the name of the employee who had rung the bell, Price told him that he was recommending a 3-day suspension.[15] McGlothian's testimony confirms Price gave no pronouncement of discharge on January 10.[16] Additionally, it is not reasonable that McGlothian would have withheld this information from Price, who was his friend. By giving him financial assistance in the past and providing him with a ride home every night, Price had an established practice of helping McGlothian. It is reasonable that Price would have intervened on McGlothian's behalf if it appeared that McGlothian would be accused wrongly for stopping production.[17] I credit Price's testimony that McGlothian never indicated to him that any other person was involved in ringing the bell. Thus, I do not credit McGlothian's testimony that he failed to name Sledge to Price because he did not want to get another employee fired. By McGlothian's alleged failure to identify Sledge to Price and his admitted failure to raise his denial with any other management official prior to the trial, I find no basis to credit McGlothian's denial of his ringing of the bell.

I further find that McGlothian's credibility is diminished by the testimony of Jerry Ford, the only other witness called by General Counsel to corroborate the testimony of McGlothian. McGlothian testified that when Price entered the breakroom, employee John Smith was addressing the assembled employees. Ford however, testified McGlothian was speaking with the employees when Price entered the breakroom. McGlothian testified that both he and other employees were upset during the January 10 lunchbreak when they learned of the inflammatory statement alleged to have been made by Price. McGlothian further asserts that it was the emotional response to this statement that spurred Darrell Sledge to ring the bell and stop production. Certainly, it is understandable that such a statement would have incited the employees and stirred the emotions as McGlothian alleges. On the basis of the overall record however, I am not convinced that Price ever made such a statement or that such a statement was even discussed by employees during their lunchbreak on January 10. It is the testimony of Jerry Ford that supports my conclusion. Ford testified he had been called into Price's office about 2 days following the discharge of McGlothian. Price told Ford that McGlothian had been fired and also told him that no meetings could be called by anyone other than a supervisor. General Counsel proceeded to inquire about the alleged statement by Price:

> Q. Did you all—do you recall discussing any alleged statements made by Mr. Price?
>
> A. Alleged statements? No
>
> Q. Are you certain you don't recall discussing any rumors concerning Mr. Price?
>
> A. He stated to me that someone had said he had called the holiday a "nigger" day, but he said that he didn't say that.

Later in the examination, General Counsel attempts to further elicit testimony about the alleged inflammatory statement. Ford's testimony in response to General Counsel's direct examination contained the following:

> Q. So do you recall discussing—did you have a lunch break on the 10th?
>
> A. On the 10th, yes.
>
> Q. Was the holiday brought up during that lunch break?
>
> A. Yes.
>
> Q. Okay. Now how many employees were present for that?
>
> A. It was the lunch break hour, so most of second shift was in there.
>
> Q. Do you recall what was said about the holiday?
>
> A. Well, Mr. McGlothian—he had stated that we were being done unfair.
>
> Q.And did he explain what he meant by unfair?
>
> A. Yes. He was saying it shouldn't have been a mandatory day like on that holiday. It should have been a national holiday.
>
> Q. Okay, did anybody respond?
>
> A. Yes. Somebody was, you know, talking about it back and forth.

---

[14] While McGlothian alleged that former employee Steve Winningham witnessed Seldge's ringing of the bell, Winningham was not called to corroborate McGlothian's testimony.

[15] McGlothian testified that Price told him "I'm going to send you home tonight. Come back tomorrow, and I'm going to see to it that you don't get fired. I will recommend you to get three days off suspension."

[16] The record is without contradiction that Price's authority extended only to suspensions and did not include the authority to terminate.

[17] Price testified that had McGlothian told him that he had not rung the bell, he would have believed him based upon their friendship.

Q. Talking about it. What do you mean by talking about it?

A. They was joining in on conversation with them.

Q. Was there some kind of agreement or disagreement?

A. A mock (phon.) agreement.

Q. Was anything said during this meeting, or during the lunch break on the 10th?[18]

A. On the 10th? No.

Q. Here there any other statements made by Mr. McGlothian?

A. He just said that we may need to take it to management. You know, see if we could get the holiday.

Q. Did employees respond to that?

A. Yes.

Q. And what was their response?

A. They said that they would like to do that.

Q. Was Mr. Price discussed at the meeting, at the lunch break?

A. No.

Q. He wasn't brought up during the lunch break?

A. No.

Q. Do you recall Mr. McGlothian mention Mr. Price during the lunch break?

A. He just- yeah. Mr. McGlothian said that he felt that he didn't understand why Price and the Chep Company would not allow us to be off on that holiday.

Q. Okay. Was there any mention of any statements made by Mr. Price concerning the holiday?

A. No.

Thus, even though General Counsel diligently attempted to elicit corroborating testimony from Ford, none was forthcoming. Based on Ford's testimony, I find no basis to credit McGlothian's testimony concerning the racially inflammatory statement attributed to Price. Noting that Jerry Ford is also African American; it is reasonable that this kind of statement and discussion would have been significant enough to recall. Based upon the overall testimony of all witnesses and the lack of credibility found in McGlothian's testimony, I find that it is more believable that McGlothian fabricated this rumor in support of his testimony. Other than the hearsay testimony of McGlothian, the only testimony referencing this statement is Ford's confirmation that Price denied making such a statement.[19] There is thus only hearsay testimony that such a statement was ever made or discussed.

Based on my observation of the demeanor of all of the witnesses and considering the record as a whole, I find McGlothian was terminated because of his unauthorized ringing of the break bell and the resulting cessation of production, rather than for any protected concerted activity. I must further conclude McGlothian was responsible for such conduct, which is violative of plant rules.[20]

I also find McGlothian's ringing of the break bell falls into an area where the Board has declined to extend protection. As discussed above, I find that Respondent did not terminate McGlothian for protected concerted activity, but because of his unauthorized ringing of the break bell. At 8:45 p.m.[21] on January 10, the employees had only been back at their workstations for a short time since their lunchbreak, which had lasted from 7:30 to 8 p.m. By calling another break for employees, McGlothian was establishing an additional breaktime for employees as well as stopping plant production. It is well established that a partial refusal to work constitutes unprotected activity.[22] Both the Board and courts have condemned employees' refusal to work on the terms lawfully prescribed by the employer while remaining on their jobs. The Board has observed that to countenance such conduct would be to allow employees to do what it would not allow any employer to do, "to unilaterally determine conditions of employment." See *L & BF, Inc.*, 333 NLRB 268 (2001); *Cambro Mfg. Co.*, 312 NLRB 634 (1993); and *Bird Engineering*, 270 NLRB 1415 (1984).[23] In a recent decision in *House of Raeford Farms, Inc.*, 325 NLRB 463 (1998), the Board found employees' concerted activity to be without protection. In that case, General Counsel alleged that certain employees concertedly walked out in protest of having to work overtime on a holiday. The Board however, found that the employees were simply attempting to unilaterally determine their terms and conditions of employment. In the instant case, I find that McGlothian attempted to usurp Respondent's management role and to set his own terms and conditions of employment. By ringing the break bell, he determined that employees would be given an additional break despite the effect upon plant production. Thus, McGlothian's activity, even if concerted, was not protected.[24]

In his brief, Counsel for the General Counsel argues the reasons given for McGlothian's termination are pretextual and the pretextual nature of the discharge is demonstrated by Respondent's shifting defenses and reasons for discharge. In support of this argument, General Counsel relies on McGlothian's testimony concerning his termination interview on January 11. McGlothian testified that Respondent did not discuss with him items 2 through 4 of the termination letter. General Counsel further submits that in its written response to McGlothian's appeal letter, Respondent added insubordination. I have re-

[18] It would appear that a word is omitted from the transcript. It is reasonable that the question included whether there was "anything else" said during this meeting or during the lunchbreak on the January 10.

[19] Price denied that he ever made such a statement. Price testified, "No, I did not say it. And the reason I didn't say it is that Dr. King is my hero also."

[20] The Board has recognized the burden of proof is on General Counsel to show the employer's honest belief was mistaken, and that the alleged misconduct did not in fact occur. *Bo-Ty Plus, Inc.*, 334 NLRB 523 (2001).

[21] McGlothian recalled that the event occurred around 8:15 p.m.

[22] As early as 1954, the Board recognized a partial strike by employees is an unprotected attempt to dictate terms and conditions of employment. *Valley City Furniture*, 110 NLRB 1589 (1954); and *U.C. Koenig Chevrolet*, 263 NLRB 646, 650 (1982).

[23] In *Bird Engineering*, employees had specifically verbally protested a new rule prohibiting them from leaving the plant during lunchbreak. Thereafter several employees concertedly left the facility at lunchbreak. The Board found the employees' defiance of the Respondent's authority left the Respondent with little choice but to take disciplinary action.

[24] *Vencare Ancillary Services*, 334 NLRB 965 (2001).

viewed the testimony of McGlothian as well as the two letters that were given to him concerning his discharge. In his testimony, McGlothian admitted that when Rued spoke with him on January 11, he told McGlothian that he had violated more than one of Chep's policies. McGlothian asserts Rued identified "solicitation of trying to get the employees to participate in the act and ringing the break buzzer." McGlothian also confirmed that when he talked with Joyce Lee on the following Monday, Lee discussed with him the various work rules that were listed on his termination letter. She also discussed with him the potential harm that could have resulted from his unauthorized ringing of the break bell.

During the meeting on January 11 and then later in Respondent's letters of January 15 and 29, Respondent also enunciated the specific plant rules that were violated as a result of his unauthorized ringing of the break bell. I find no inconsistency or shifting reasons in Respondent's explanation of its basis for discharge. Without doubt, McGlothian knew on January 10 that any discipline imposed resulted from his unauthorized ringing of the bell. If McGlothian's testimony were credited, he admits he did not disclose Sledge's name because he didn't want two people to be terminated. Accordingly, the total record evidence, including the testimony of McGlothian, reflects that beginning on January 11, Respondent's decision to terminate McGlothian was triggered by his unauthorized ringing of the break bell. Respondent's listing of the individual violations emanating from his action does not constitute shifting reasons for his discharge.

As discussed above, I do not find the record has established that McGlothian's concerted activity was a "motivating factor" in Respondent's decision to terminate his employment.[25] Even assuming that Respondent's decision was motivated in part by McGlothian's concerted activity, Respondent has demonstrated that the same action would have taken place even in the absence of any protected concerted activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB 1279 (1999). Based on the totality of the evidence, I am persuaded that Respondent would have taken the same action even if McGlothian had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). *Yuker Construction Co.*, 335 NLRB 1072 (2001).

2. Respondent's no-solicitation/no-distribution policy

In its brief, Respondent cites *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245 (5th Cir. 1992), for the premise that an employer can have a rule that bans all solicitation during working time if the employees can solicit during breaks and before and after work. Prior to January 1, 2001, Respondent prohibited any unauthorized solicitation in any form on its premises. The policy also prohibited any unauthorized soliciting or distributing of literature to employees while on duty or on company premises. The Board has held that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on the employees' own time and in non-working areas is unlawful. *Brunswick Corp.*, 282 NLRB 794 (1987), and cases cited therein. On its face, Respondent's rule prior to January 1, 2001, prohibited employee solicitation and the distribution of materials in nonwork areas unless authorization was obtained. The Board has recognized that employees are presumptively privileged to solicit in nonworking areas on company property during their breaktimes. *Garfield Electric Co.*, 326 NLRB 1103 (1998). The Board has also determined that a no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful. *MTD Products, Inc.*, 310 NLRB 733 (1993).

When a rule of this kind is found presumptively unlawful on its face, the employer bears the burden of showing that it communicated or applied the rule in a way that conveyed a clear intent to permit solicitation on nonworking time or the distribution of literature in nonworking areas on nonworking time. A clarification of an ambiguous rule or a narrowed interpretation of an overly broad rule must be communicated effectively to employees to eliminate the impact of a facially invalid rule. *TeleTech Holdings, Inc.*, 333 NLRB 402 (2001). Respondent presented no testimony or documentary evidence to demonstrate a disclaimer of the presumptively unlawful solicitation and distribution policy that existed prior to January 1, 2001.

Respondent submits that no employee was disciplined under the prior policy. The Board has long held that an invalid no solicitation rule may not be cured by the absence of proof that it was ever enforced. The mere maintenance of such a rule serves to inhibit employees from engaging in otherwise protected organizational activity. *Olathe Healthcare Center*, 314 NLRB 54 (1994); *Schnadig Corp.*, 265 NLRB 147 (1982); and *General Signal Corp.*, 234 NLRB 914 (1978). Thus, I find that Respondent maintained a solicitation and distribution rule from August to December 31, 2000, in violation of Section 8(a)(1) of the Act.[26] *Caval Tool Division*, 331 NLRB 858 (2000), enf. granted 262 F.3d 184 (2d Cir. 2001).

General Counsel maintains Anthony McGlothian's discharge is violative of Section 8(a)(1) of the Act because it was effected under Respondent's invalid no-solicitation rule. At hearing, Human Resources Administrator Lee and Director of Field Human Resources Kuchwara testified that McGlothian was terminated under the company rules contained in the newly implemented 2001 employee handbook. General Counsel offered into evidence a letter written to the Board by Respondent's counsel in April 2001. Counsel states in the letter that the prior work rules were in place at the time of McGlothian's termination. Counsel further explains that the new work rules were in the process of being printed and distributed at the time of McGlothian's termination. Counsel for the General Counsel submits that the letter is an admission against interest and clearly indicates the old rules were in effect as of January 10. In cases involving such prehearing letters and statements, the Board has held that in the absence of prehearing disavowal, the statement may be treated as an admission against interest. See *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001). In

[25] *Meyers Industries, Inc. (Meyers I)*, supra at 497.

[26] The new employee handbook implemented on January 1, 2001, is not found to be violative of the Act.

that same decision, the administrative law judge discussed the predicament of an attorney's statement contradicting the testimony of his or her client. Quoting from the Supreme Court, the judge noted "It is a rare attorney who will be fortunate enough to learn the entire truth from his own client." *Wheat v. U.S.*, 486 U.S. 153, 163 (1994). Citing *Altorfer Machinery Co.*, 332 NLRB 130 (2000), the judge further noted "By the hearing stage, indeed, an attorney may be left vulnerable to sometimes abrupt changes in statements made to counsel before the hearing or, even, at counsel table during the hearing, when the client later testifies." Despite how the contradiction came to exist, Respondent's letter of April 2001 letter constitutes an admission against interest.[27] As in *Orland Park* however, the resolution of the issues can be made without resort to what is said in Respondent's position statement. Having found McGlothian was terminated because of his unauthorized ringing of the break bell rather than because of any protected concerted activity, his termination does not constitute a separate 8(a)(1) violation as argued by General Counsel.[28]

### 3. Summary

In summary, I have found the Respondent did not violate Section 8(a)(1) of the Act by terminating the employment of Anthony McGlothian. I have found Respondent violated Section 8(a)(1) of the Act by maintaining a rule requiring employees to obtain authorization to engage in protected concerted activity in nonworking areas on the employees' own time.[29]

In accordance with my conclusions above, I make the following

## CONCLUSIONS OF LAW

1. Respondent, Chep USA, is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining a rule requiring employees to obtain company authorization to engage in protect activity in non-working areas on the employees' nonworking time.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To the extent that it has not already done so, the Respondent will be required to rescind the unlawful solicitation/distribution rules and notify employees that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

## ORDER

The Respondent, Chep USA, of Sardis, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rule that requires employees to obtain company authorization to engage in protected activity in nonworking areas on the employees' own time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, notify its employees in writing, by memo or letter separate from the notice to employees that the solicitation/distribution rule that existed until January 1, 2001, is no longer in effect.

(b) Within 14 days after service by the Region, post at its facility in Sardis, Mississippi, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 26 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 5, 2001

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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[27] *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998).

[28] I also note that the January 15 termination letter references the 2001 solicitation rule as one of the violations emanating from his conduct.

[29] The employee handbook that existed prior to January 1, 2001 contained two provisions pertaining to solicitation and distribution. The first section prohibits any unauthorized solicitation or distribution in any form on Chep's premises. The second section prohibits any unauthorized solicitation or distribution while on duty or on Chep's premises. Taken as a whole, I find Respondent's rules prohibited unauthorized solicitation or distribution in non-working areas on non-working time.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes..

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule that requires you to obtain our authorization to engage in protected activity in nonwork areas on your own time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE HAVE rescinded the rule that required you to obtain our authorization to engage in protected activity in nonwork areas on your own time.

CHEP USA